

Supreme Court, U. S.,

FILED

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MICHAEL RODIA, JR., CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

No. 77-908

DR. JOHN G. MADRY, JR.,  
Petitioner,

v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN,  
DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., et al.,  
Respondents.

On Petition for a Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION**

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Governors and Officers

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**SUPREME COURT OF THE UNITED STATES**

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No. 77-908

DR. JOHN G. MADRY, JR.,  
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v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN,  
DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., and  
THE MEMBERS OF ITS BOARD OF GOVERNORS,<sup>1</sup>  
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**BRIEF FOR RESPONDENTS IN OPPOSITION**

**OPINION BELOW**

The order of the United States District Court for the Middle  
District of Florida is not reported; copy thereof is set forth in

<sup>1</sup> The individual members of the Board of Governors were named as defendants. They are: James E. Holmes, Chairman; Frederick L. McFarlin; Bernice S. Newell; R. P. Sullivan, Jr.; Harold E. O'Kelley; Dr. T. J. Kaminski; Dr. John M. Langstaff; Kathryn R. Lowery; Bernice A. Maxwell; John T. Turner, Jr.; Charles F. West, and Dr. James A. Sewell.

the Petitioner's Appendix A-5. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 558 F.2d 303, and copy is included in Petitioner's Appendix A-9. The order of the Court of Appeals denying rehearing and rehearing *en banc* is noted at 561 F.2d 831.

### **JURISDICTION**

The jurisdictional requisites are sufficiently stated in the Petition.

### **QUESTION PRESENTED FOR REVIEW**

Whether there is a sufficient state nexus to find that a private non-profit hospital is acting under color of state law in terminating the staff status of a physician where the corporate affairs and funds of the hospital are controlled and administered by a board of governors who are neither government officials nor government appointees and where regulation, licensing, tax exemption and receipt of Hill-Burton funds are not in any way related to the discharge by that hospital of a member of its medical staff.

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

United States Constitution, Amendment V and Amendment XIV; 28 U.S.C. §1331 (a) (1970 ed.); 42 U.S.C.A. §1983, 17 Stat. 13, which are quoted on pages 3 and 4 of the Petition.

### **STATEMENT OF THE CASE**

The Petitioner, Dr. John G. Madry, Jr., a licensed physician, brought this action in the District Court on June 27, 1969, against the Respondents, Brevard Hospital Association, Inc., a

nonprofit corporation, the members of its Governing Board and certain doctors on the medical staff, alleging that he had been permanently suspended as a member of the staff at the Hospital in May 1966, in violation of rights secured to him by the Constitution.

Doctor Madry joined the staff of Brevard Hospital on January 1, 1961. In May of 1966, he was permanently suspended from staff privileges by the Board of Governors of the Hospital after a series of violations of Hospital rules which persisted in the presence of written reprimands and two periods of probation—the last of which was the sterilization of a county welfare patient without her written consent.

In his Complaint Doctor Madry sought a Declaratory Judgment, a permanent injunction, reinstatement to the Hospital medical staff, and damages in excess of one million dollars. After protracted litigation in both the District Court and the Circuit Court of Appeals for the Fifth Circuit, the District Court on February 17, 1976, dismissed this case for lack of Federal jurisdiction.

The question of whether the District Court had jurisdiction of the case depends upon whether the action of the Board of Governors of the Hospital in terminating the staff status of Doctor Madry was "state action" or whether it was purely private action.

The history of the Brevard Hospital appears fully in the record and is summarized carefully in the Affidavits of James E. Holmes (Appendix A), Chairman of the Board of Governors, and Harry J. Underill (Appendix B), administrator of the Brevard Hospital, and we shall not belabor it here.

Brevard Hospital is a private, nonprofit, tax-exempt hospital. While it is true that the land on which the Hospital was built was purchased from the City of Melbourne, Florida, for a nominal price, the Hospital itself was paid for with funds received from a public fund-raising drive and through the use of Federal Hill-Burton funds. All additions to the Brevard Hos-

pital have been paid for primarily with donations from the public, Hill-Burton funds, and a mortgage loan from a savings and loan association.

Brevard Hospital is not owned by the Federal or State Government. It is not an instrumentality of government for the administration of any public duty, although the services it performs are in the public interest. The Board of Governors is the ultimate authority in determining Hospital policy and acts independently of any influence from the State of Florida or any political subdivision thereof. Its officers and members of the governing body are not appointed by and are not the representatives of government, notwithstanding that their authority stems from the corporate charter issued by the State. Although the Brevard Hospital by-laws at one time allowed two Brevard County commissioners and the mayors of ten Brevard County municipalities to serve as ex officio members of the Board of Governors, they served at the grace of the private corporation and could be removed by a by-law amendment of the corporation without the consent of the Florida Legislature, the Brevard County Commission or the officials of the various Brevard County municipalities. This step was in fact taken sometime after the dismissal of Doctor Madry, so that presently there are no public officials serving as "ex officio" members of the Board. There is evidence in the record that no ex officio member had ever participated as a member of the Board and that the Board acted independently of the City of Melbourne and Brevard County and that no ex officio member ever attended a Hospital Board meeting.<sup>2</sup>

On appeal the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court and held that the actions of Brevard Hospital did not equal state action and, consequently, the District Court lacked jurisdiction to hear this case.

<sup>2</sup> The Affidavit of the Hospital Administrator (Appendix B) clearly indicates that the municipal and county officials never participated as members of the Board and had never attended a Board meeting since October 1952, the date of the Administrator's employment.

#### REASONS FOR DENYING WRIT

Petitioner asks this Court to grant Certiorari and argues that the question presented is one of national scope involving an important question for which there is a need for a uniform rule in all the circuits.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court stated, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." 365 U.S. 715, 722.

The District Court "sifting facts and weighing circumstances" carefully examined all of the "points of contact" of the Brevard Hospital with government and found that there was nothing to indicate that the State was in any way involved with the dismissal of Doctor Madry from the medical staff of Brevard Hospital.

Nor does there exist here the symbiotic relationship between the City and the Hospital found existing in *Burton, supra*. Although the land on which the Hospital was built was sold by the City to the Hospital for a nominal price, the Hospital itself was paid for with funds received from a public fund-raising drive and through the use of Hill-Burton funds, and the Hospital is not part of a government project nor does the financial success of any government operation depend upon the medical staff policy promulgated by the Hospital. The Hospital is a self-sustaining medical facility whose operating funds are not supplied by any governmental entity.

This Court made it clear in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), that an action taken by a private corporation is not necessarily or automatically "state action" merely because the corporation is chartered by the state, or because the activities of the corporation are strictly regulated

by the state, or because the functions performed by the corporation serve the public convenience and necessity. Before the action in question can properly be characterized as "state action", there must be a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself". 419 U.S. at 351. In the instant case there is nothing to indicate that there was any connection between Doctor Madry's dismissal from the staff of the Hospital and the fact that the Hospital had received Hill-Burton or other public funds, or the fact that the Hospital has a tax-exempt status, or the fact that the Hospital was subject to State regulation. Hence, there is no such nexus between the State's relationship to the Hospital's operation and the dismissal of Doctor Madry as to justify attribution of the challenged action of the Hospital to the State.

This Court denied Applications for Writ of Certiorari in *Greco v. Orange Memorial Hospital Corporation*, 423 U.S. 1000 (1975), and in *Taylor v. St. Vincents Hospital*, 424 U.S. 948 (1976). The Petitioners in both *Greco* and *Taylor* complained that the actions of the Respondent hospitals in refusing to perform elective abortions were unconstitutional in that they interfered with the liberty of a woman to choose whether or not to bear a child, in violation of the Fourteenth Amendment as construed in *Roe v. Wade*, 410 U.S. 113. The dissent to the denial of the Writ of Certiorari in *Greco* made reference to the difficult task of policing the Court's decision in *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179, and the Court's responsibility of resolving the problems arising in the wake of those decisions.

Respondents respectfully submit that this case did not arise in the wake of those decisions, and the finding of the Fifth Circuit that "state action" was not involved in the dismissal of Doctor Madry from the medical staff of Brevard Hospital is not appropriate for review. The decision in this case is not one

involving broad questions of general national importance but rather one where the Petitioner was merely unable to establish a sufficiently close nexus between the State and the Brevard Hospital to invoke subject matter jurisdiction.

This case is even less appropriate for review than was *Greco*, as the Order of Dismissal entered by the District Court found that the facts alleged in this case indicated a level of involvement by the State much lower than that of *Greco*. *Greco* thus presented a more substantial state-action issue than the present case in the light of *Burton v. Wilmington Parking Authority*, *supra*.

The view taken by the Court of Appeals for the Fifth Circuit in this case and the *Greco* case, *supra*, accords with that taken by sister circuits, other than the Fourth.<sup>3</sup>

Petitioner argues that there is an inconsistency in the holding by the Fifth Circuit in *Greco*, *supra*, and *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F. 2d 173 (5th Cir. 1971). The *Sosa* case can easily be distinguished from *Greco* and the case at bar as the Val Verde Memorial Hospital in *Sosa* was in fact not a private hospital, but rather a county institution owned by the county, constructed, maintained and operated with county funds and, more importantly, governed by a board of managers appointed by the county commissioners of Val Verde County.

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<sup>3</sup> *Taylor v. St. Vincents Hospital*, 523 F.2d (9th Cir. 1975), cert. denied, 424 U.S. 948; *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975); *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103 (9th Cir. 1974); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Jackson v. Norton-Children's Hospital, Inc.*, 487 F.2d 502 (6th Cir. 1973); *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973); *Ward v. St. Anthony Hospital*, 476 F.2d 671 (10th Cir. 1973); *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976); *Sokol v. University Hospital*, 420 F.Supp. 1029 (D. C. Mass. 1975); *Barrett v. United Hospital*, 376 F.Supp. 791 (S.D. N.Y. 1974); *Slavcoff v. Harrisburg Polyclinic Hospital*, 375 F.Supp. 999 (M.D. Pa. 1974).

In an effort to demonstrate that a conflict exists among the circuits on the question involved in this case and that this question has arisen with sufficient frequency to warrant this Court's attention, Petitioner has listed in his Appendix some 35 cases which have been decided over a period of 20 years in the different circuits. With the exception of those cases in the Fourth Circuit, all the cases which are cited as authority "for Federal jurisdiction found" are cases involving public hospitals owned and operated by a public authority, or are cases which were decided before *Jackson v. Metropolitan Edison Co.*, *supra*, or they are cases where the state action question was not raised.

In the cases cited from the Fourth Circuit, the critical state involvement was in the very prohibited action under constitutional attack. In the leading case of *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), the State of North Carolina distributed Hill-Burton funds to a private, racially segregated hospital pursuant to a State policy of racial discrimination in hospitals within the State. This activity violated the equal protection clause since it was promoting the hospital's blatant and continuing discriminatory practices and was placing the State's power and prestige behind the hospital's segregation policy. Such encouragement of prohibitive conduct consistently has been held to amount to state action.

Another case involving the equal protection clause is *Sams v. Ohio Valley General Hospital Association*, 413 F.2d 826 (4th Cir. 1969). There a private hospital receiving Hill-Burton funds refused to give staff privileges to doctors from other counties. Although this case concerned discrimination other than racial discrimination, it nonetheless involved state support to a hospital which arbitrarily denied its facilities to a segment of the population, contrary to the provisions of the "Hill-Burton Act." This again was an equal protection case.

The conduct which is challenged in the present case is the discharge of Doctor Madry from the medical staff of Brevard Hospital, and the record does not reflect any governmental involvement nor is the State and the Hospital so intertwined as to make them joint participants within the meaning of *Burton v. Wilmington Parking Authority*, *supra*.

#### CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Post Office Box 1376  
Melbourne, Florida 32901  
Attorney for Respondents Brevard  
Hospital Association, Inc., Its Board  
of Governors and Officers

# **APPENDIX**

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**APPENDIX A**

**Exhibit "A"**

In the District Court of the United States  
For the Middle District of Florida

Dr. John G. Madry, Jr., Plaintiff,  
vs. Dr. Otto G. Sorel, et al., Defendants. } Civil Action  
Defendants. } No. 69-136-Orl.

**Affidavit of James E. Holmes in Support of  
Defendants' Motion to Dismiss**

State of Florida  
County of Brevard }

JAMES E. HOLMES, upon being duly sworn, deposes and  
says:

1. That he resides at 2800 S. Albemarle Drive, Melbourne, Florida; that he is a Member of the Board of Governors and is President of the Brevard Hospital Association Incorporated; that he has been a member of the said Board of Governors since 1952 and has been the President of said Corporation since 1954; and that he is familiar with the corporate history of the Brevard Hospital Association Incorporated.

2. Your Affiant avers that he attended and presided at a meeting of the Board of Governors in May, 1966, at which the Medical Staff privileges of the Plaintiff at the Brevard Hospital were permanently suspended; that the Plaintiff did not

request a specification of the charges against him or a hearing before the Board on those charges or the right to be present [254] at said meeting, and has not since said meeting requested from the Board a specification of charges or an opportunity for a hearing thereon; that the reasons for the suspension of the Plaintiff from the Staff were well known to the Plaintiff and are now, and have always been available to the Plaintiff were he to inquire of them.

3. That the Brevard Hospital Association was originally incorporated as a private corporation under the laws of the State of Florida and under the name of BREVARD HOSPITAL Association, a Corporation not for profit, pursuant to a proposed Charter which was filed before the Judge of the Circuit Court in and for the 23rd Judicial Circuit of the State of Florida, and approved by him on the 8th day of August, 1931, and recorded in the Public Records of Brevard County, Florida, in Incorporations Book 4 at Page 445, and that there is attached hereto and marked Exhibit "1", a copy of the original Charter of said Hospital.

4. That BREVARD HOSPITAL ASSOCIATION, INCORPORATED was re-incorporated under the provisions of Chapter 617 of the Florida Statutes pursuant to the Articles of Incorporation which were filed in the office of the Secretary of State of the State of Florida, on the 13th day of February, 1969; that there is attached hereto and marked Exhibit "2", a copy of these Articles of Incorporation.

That the BREVARD HOSPITAL ASSOCIATION, after first coming into existence, operated a small hospital on leased premises located in what is now known as the "Crenshaw Hotel" on River Drive in South Melbourne, Florida.

[255] Shortly after receipt of a gift of land located at N. Dixie Highway, Melbourne, Florida, from Mr. and Mrs. John B. Rodes, the BREVARD HOSPITAL ASSOCIATION, in the mid 1930's entered into an Agreement with the City of Mel-

bourne and by the terms thereof, the Hospital Association was to convey said Hospital property acquired by gift, to the City of Melbourne. This conveyance was conditioned upon the City obtaining a Public Works Administration Loan and other necessary financing to construct a Hospital Facility on said property. Said agreement further provided that when the indebtedness incurred by the City for the construction costs was retired, that the City would then transfer the land and improvements back to the Hospital Association.

In accordance with said Agreement between the Association and the City, the City, in November, 1935, applied for and obtained a Public Works Administration Loan of forty five (45%) per cent of the cost of the Hospital, not to exceed, however, the sum of TWENTY THOUSAND FOUR HUNDRED AND FIFTY FOUR (\$20,454.00) DOLLARS. In September, 1936, and after a Contract for the construction of the Hospital was awarded by the City, a referendum was held in said City whereby the issuance of THIRTY THOUSAND (\$30,000.00) DOLLARS in Revenue Certificates, representing the balance of construction costs for the Hospital, was approved. By the terms of said Certificates, the repayment of the indebtedness evidenced thereby was to be made solely from the revenues derived from the Hospital and not considered a pledge of the general credit of the City. Actual construction of the Hospital was commenced in the Fall of 1936 and completed and accepted by the City in June of 1937.

[256] From June, 1937, until June 30, 1945, when the entire indebtedness incurred by the City of Melbourne on behalf of the Brevard Hospital was retired and paid in full, the Hospital property and improvements thereon were conveyed back to the Brevard Hospital Association by the City. During said eight (8) year period, the Hospital was managed by a Board of Governors elected by the Association Members, subject, however, to the approval of the City. Since June 30, 1945, the

Hospital has been operated by the Board of Governors elected annually by the Membership of the Association and completely independent of said City.

By virtue of a Special Act enacted by the Florida Legislature, a special free-holders' election was held in May, 1950, for the purpose of approving or disapproving a special tax district created for the purpose of owning, maintaining, supporting and operating the Brevard Hospital. This proposal was rejected by the electorate at said referendum election.

During the early 1950's, the Brevard Hospital, then located on North Dixie Highway, was enlarged on two occasions through the addition of a twenty bed wing and thereafter by the remodeling of the former Nurses' Home into a fifteen bed maternity unit and attendant delivery rooms.

In the month of April, 1956, a special election was called by the City of Melbourne to enable the electorate of said City to approve or disapprove a proposed sale by said City of certain property then owned by the City and which now constitutes the present Hospital Site. This measure was approved by the citizens, and accordingly, said property was sold and conveyed by the City to the Hospital.

[257] During the late 1950's, a fund raising drive was conducted by the Brevard Hospital Association and an amount in excess of One Million Dollars was contributed to a Hospital construction fund. These funds thus collected and a Hill-Burton Grant in excess of One Million Dollars were used to construct the present Hospital which was opened in 1962. With the use of operating funds, contributions, a Hill Harris Grant in excess of 1.3 Million Dollars, a 3.5 Million Dollar expansion program was commenced in January, 1968, and is now virtually completed; that BREVARD HOSPITAL ASSOCIATION, INCORPORATED is a private non profit Corporation, the man-

agement of which neither the State of Florida, or any agent, agency or instrumentality thereof participates.

/s/ JAMES E. HOLMES  
Affiant

Sworn to and subscribed  
before me this 6th day  
of February, 1970.

(Illegible)  
Notary Public

My Commission Expires: April 9, 1973

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[1394]

**APPENDIX B**

United States District Court  
Middle District of Florida  
Orlando Division

Case No.  
69-136-Orl-Civ-Y

Dr. John G. Madry, Jr.,  
Plaintiff,  
vs.

Dr. Otto G. Sorel, et al.,  
Defendants.

**Affidavit of Harry J. Underill in Support of Defendant, Brevard Hospital Association's Motion to Vacate or Modify Order**  
**Dated January 22, 1975**

State of Florida  
County of Brevard }

HARRY J. UNDERILL, upon being duly sworn, deposes and says:

1. That he resides at 450 Bahama Drive, Indialantic, Florida; that he is the Administrator of Brevard Hospital located in Melbourne, Brevard County, Florida; that he has been so employed since October, 1952; and that he has personal knowledge of the matters set forth herein.

2. That your affiant was employed by the Brevard Hospital Association as Administrator of the Brevard Hospital in Octo-

ber, 1952, and has been employed continuously in that capacity and without interruption to the date of this affidavit.

3. That Brevard Hospital Association was originally incorporated as a private corporation under the laws of the State of Florida and under the name of Brevard Hospital Association, a corporation not for profit, pursuant to a proposed charter which was filed before the Judge of the Circuit Court in and for the Twenty-third Judicial Circuit of the State of Florida, and [1395] approved by him on the 8th day of August, 1931, and recorded in the Public Records of Brevard County, Florida, in Incorporations Book 4, at Page 445. There is attached hereto and marked Exhibit "A" a copy of the original charter of said Hospital.

4. That Brevard Hospital Association, Incorporated was reincorporated under the provisions of Chapter 617 of the Florida Statutes pursuant to the Articles of Incorporation which were filed in the Office of the Secretary of State of the State of Florida on the 13th day of February, 1969. A copy of said Articles of Incorporation is attached hereto and marked Exhibit "B".

5. That since October, 1952, the date of employment of your affiant by the Brevard Hospital Association, there has been no participation in the affairs of the Hospital by either municipal or county officials, and that since October, 1952, to the best of your affiant's knowledge, no city official or county official has ever attended a meeting of the Board of Governors or said Hospital. That the Brevard Hospital Association is a private non-profit corporation, and that as such neither the State of Florida, the County of Brevard, the City of Melbourne, or any agent, agency or instrumentality thereof participates.

6. Your affiant further states that as Administrator of the Brevard Hospital he is familiar with the by-laws of the Brevard

Hospital Association, that Article III, Section 1, Paragraph (A) of said By-Laws was not amended on June 6, 1973.

7. That the City of Melbourne on February 16, 1960, conveyed to the Brevard Hospital Association certain property then owned by the City and which now constitutes the present hospital site; that said conveyance was made by Special Warranty Deed dated February 16, 1960, recorded in Official Records Book 272, at Page 545, of the Public Records of Brevard County,

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